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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~749~~ 45

FEDERAL POWER COMMISSION,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE CITY OF NEW YORK, and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondents.

No. ~~749~~ 46

NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC.,

Petitioners,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

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Reasons for Denying the Writ

The Petitions for Writ of Certiorari * and the supporting briefs amici curiae filed herein seek to review and upset the unanimous decision below of the Court of Appeals on grounds that find no foundation in the record herein and which distort the narrow scope of the actual decision.

Consolidated Edison Company of New York, Inc. (Edison), a locally regulated utility distributing gas, electricity and steam to the public in metropolitan New York City, contracted to purchase natural gas from Texas producers for use in abating a smoke nuisance at one of its steam and electric generating plants adjacent to the United Nations. Neither such purchase nor use by the owner was subject to the jurisdiction of the Federal Power Commission. That body, however, for policy reasons, including a belief that it would be better for some other agency to purchase or use the gas, in effect prevented such purchase and such use by refusing Transcontinental Gas Pipe Line Corporation (Transco) the certificate necessary for the transportation of such gas for Edison's account from Texas to New York under Transco's proposed X-20 rate schedule.**

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* Unless otherwise specifically stated the statements in this Brief are directed to the Petition of the Solicitor General since that Petition encompasses all of the more important contentions raised in the other documents filed with this Court.

** The combined transportation and peaking service to be supplied to Edison by Transco under its X-20 rate schedule has customarily been referred to as the X-20 service. To provide this service Transco agreed to construct and operate additional facilities increasing the capacity of its pipelines by 50,000 Mcf. In addition to agreeing to transport 50,000 Mcf of Edison's natural gas daily from Texas to New York, Transco also agreed during 60 days in each year to supply Edison, upon request, and in substitution for Edison's Texas gas, with up to 50,000 Mcf of natural gas per day from Transco's own natural gas reserves. This gas would be available to Edison in any quantity up to the maximum, at any time during any 60 days in the year, and

The refusal was not based on any defect in proof nor because the proposed transportation service failed to meet the conventional standards of public convenience and necessity. A certificate was denied the transporter, Transco, solely because the Commission

(1) did not approve of a public utility purchasing gas directly in the field, when such purchase was not subject to the Commission's jurisdiction, and it

(2) did not approve of the use to which Edison intended to put its gas.

The Court below characterized the Commission's invasion of these non jurisdictional areas as an assertion of "a general allocation and conservation authority over the natural gas fields of the United States."

The issue before the Court of Appeals was whether the general certificate power over transportation could be used to frustrate Edison's lawful purchase thereby making the Commission an absolute autocrat in the allocation of the natural gas reserves of the nation between areas, agencies and uses.

The Court noted that the Commission had repeatedly sought from Congress and had been denied the very powers it here attempted to assert. After a comprehensive examination of the legislative history of the Natural Gas Act, and the cases relating thereto, the Court concluded that Congress had not granted to the Commission such general allocation and conservation authority and that what the Commission had euphemistically termed

this gas could be resold by Edison to meet the needs of its gas customers during periods of maximum or "peak" use. The objections of the Commission to the X-20 service have been directed entirely to that portion involving the purchase of natural gas in Texas by Edison and its transportation to New York by Transco for use in Edison's Waterside station.

"interstitial legislation" could not be substituted for "asked-for legislation if that legislation is not forthcoming" from Congress.

This case involves a rare, if not unique, factual situation and a narrow question of statutory interpretation. To read the Petitions for the writ, however, one would be misled into a belief that the decision below is of far broader scope and would revolutionize the functioning of the natural gas industry. While such unsupported arguments should properly be addressed to Congress, nevertheless we are compelled to point out that the Court's decision

(1) Does not threaten the present gas purchasing pattern in the natural gas industry, nor will it result in a stampede of industrial buyers to the producing fields or cause prices for natural gas to rise.

(2) Does not involve the broad legal question whether the Federal Power Commission and other administrative agencies may "consider" matters outside their jurisdiction in certificate proceedings.

(3) Does not conflict with the decisions of this Court, or the decision of any other Court of Appeals.

There would appear to be no reason why this Court should undertake to review the scholarly and limited decision of the lower Court, which merely requires the Commission to again seek from Congress the power to be the arbiter of a national fuels policy but in the meantime forbids the Commission's invasion of an area of regulation, which Congress has denied to it.

I

The wholly unsupported prediction of the effect upon the natural gas industry of the lower Court's decision provides no rational basis for granting the writ.

The significance of the lower Court's decision and its possible effect upon the natural gas industry are demonstrably exaggerated in the Petitions before this court. The Petitioners envision, as an outgrowth of the decision below, "a vast, new, unregulated, interstate market for gas" which would inflate gas prices, disrupt present patterns of industry growth and result in an "inappropriate" use of gas (S. G. Pet., p. 9).

These assertions are without any evidence in the record on which they could be based or from which any such inference could be drawn. Neither the Staff of the Commission nor the intervening coal interests presented any evidence whatsoever in the proceedings below.

In fact, these assertions in the Petitions and briefs are not supportable under the known facts of the natural gas industry, even if the Anglo-Saxon doctrine of decision based on an established and proven record may be so lightly discarded.

While protesting the need to do so, Respondent is forced in self-defense also to depart from a record completely silent in this regard. In doing so, however, we resort only to demonstrable and well-known facts of the natural gas industry. We shall present only such conclusions as an informed person might fairly draw from actual facts—not the empty assertions made in the Petitions for the writ which in the general knowledge of the industry are unfounded.

It is perfectly clear to anyone familiar with the natural gas industry that the practice of purchasing gas in the field and having it transported long distances by interstate pipelines for boiler fuel use will not, for economic reasons, become widespread. Gas normally is used as boiler fuel for one reason, and for one reason only—it is cheaper than competing fuels. In order for an X-20 type arrangement to be attractive to public utility purchasers for consumption, it must provide a source of gas that is not only cheaper than such competing fuels as oil and coal, but also cheaper than natural gas purchased from a pipeline supplier. The cost of purchasing gas in the field and having it transported over a distance is substantially greater than the cost of gas purchased from a pipeline* or the cost of other fuels.

During the year 1959 the cost to Edison in terms of cents per million Btu** of the various fuels used as boiler fuel, as compared with what the cost of X-20 boiler fuel during the same period would have been, was as follows:

Oil	35.16¢
Natural Gas	35.25¢
Coal	37.63¢
Proposed X-20 Boiler Fuel	40.00¢ (approx.)

It will be observed that the X-20 boiler fuel would have been from approximately 2.5¢ to approximately 5¢ more

* The pipeline's rate is essentially made up of two parts—the cost of gas and the cost of transportation; and these are the same two components that determine the total cost to the purchaser under an X-20 type arrangement. The transportation component is substantially the same in either case. The pipeline, however, contracted to buy its large volumes of gas years ago when prices were vastly lower. Even with additional purchases in recent years, the average price to the pipeline and its customers is far below today's inflated prices. When a utility such as Edison goes great distances to buy in a producing state it must pay the high current prices to obtain the gas.

** British Thermal Units—the measure of heat used for comparison

expensive per million Btu than the three alternative types of boiler fuel. This difference in cost would be prohibitive to any ordinary consumer not having the additional motive of reducing air pollution existing at Edison's crucial Waterside plant.

In addition to this price differential, the X-20 type of arrangement would be less desirable for most users in that it does not permit changing from one type of fuel to another as prices fluctuate, since the purchase and transportation arrangements must be made on a long term basis.

Two major benefits prompted Edison to undertake the X-20 project. It represented the only feasible answer to a major air pollution problem that had plagued the Company for years and it gave Edison an additional supply of gas for distribution to its customers during the coldest days of the winter when the needs of those customers were at their peak. This peaking service at low cost, while very valuable to Edison as a gas distributor, would not have value to a non-utility industrial consumer of natural gas.

Despite the expenditure of millions of dollars for the most modern electrostatic and mechanical devices (R. 49a-50a), the stacks of Edison's coal-burning Waterside electric generating station, located in the heart of Manhattan and virtually on the doorstep of the United Nations Building, still emitted massive quantities of carbon, fly ash and sulphur dioxide (R. 41a-42a; R. 140a). The only alternative to the utilization of natural gas under the Waterside boilers was to take the offending boilers out of service and rebuild them at a cost of $12,000,000. To accomplish this rebuilding job would take two years for each boiler. Wholly apart from the excessive cost, it would be impossible for the Company to spare the capac-

ity represented by these two boilers from its system for an extended period, and, at the same time, maintain adequate electric and steam service to the public (R. 16a).

Under continued and increasing pressure from the City of New York and the thousands of persons living and working in the vicinity of the Waterside plant (R. 47a), Edison determined to obtain a firm supply of natural gas which would permit year round use of gas under certain boilers in the Waterside plant. No firm supply could be obtained from Edison's supplier, Transco, since under the provisions of Transco's tariffs purchases of gas for boiler fuel could only be made on an interruptible basis. If it were not for all of the foregoing circumstances, Edison would not have considered, nor would if now consider, entering into an X-20 arrangement for the purpose of obtaining a supply of boiler fuel.

These undisputed facts as to Edison's motivation, which are of record, indicate the unique nature of Edison's X-20 transaction. Their mere statement demonstrates the reckless impropriety of the claim that allowing the Court of Appeals decision to stand as a precedent will open up the floodgates to a vast number of similar transactions!

Witnesses have repeatedly testified in proceedings before the Commission that industrial consumers will not purchase natural gas for boiler fuel use at prices exceeding those of alternate fuels. For example, in *Midwestern Gas Transmission Company*, 21 FPC 653 (1959), the economic feasibility of the project depended in large measure upon the consummation of proposed large scale sales of natural gas to industries in the Chicago area. The record showed that the local industries would not purchase gas at a price higher than approximately 25¢ or 26¢ per mcf because of the relative cost of competing fuels. The Commission over strong objection certificated

the project and approved a rate structure which would permit interruptible sales to industrial consumers at those low rates. Clearly, in view of the testimony in that case, none of the industries there involved would purchase the gas in the field and pay the cost of transporting it to its plant.

Finally, and most indicative of the baseless character of the Petitioners' alarming predictions, is the incontrovertible fact that industrial and utility consumers have not gone to the producing fields of other states for their natural gas supplies in significant numbers. There is nothing new or novel about the concept of using a pipeline solely for the transportation of natural gas instead of for its transportation and sale. The availability of transportation service has been no secret in the industry, yet the volume of gas transported by interstate pipelines for others has represented only a miniscule part of the total interstate movement of natural gas.

At the present time Transco provides transportation service for only two customers. One of these customers is another pipeline, the other is a producer of natural gas that ships some of its product from its wells to its plants on the Atlantic coast. Despite Transco's apparent willingness to transport gas purchased by a customer for its own use, as evidenced in this proceeding, none of Transco's other customers has availed itself of the opportunity to purchase gas directly in the field. One customer, Virginia Electric Power Company, entered into a transportation arrangement with Transco; but abandoned the project as uneconomic when the proposed transportation rate there involved was held by the Commission not to be compensatory.

The above facts, partly in the record, partly drawn from the Commission's decisions in other proceedings and partly, by unwelcome compulsion, outside the record, but established in the ken of those familiar with the natural gas industry, demonstrate that the claim that denial of certiorari will establish a "vast new" pattern in the natural gas industry, supposedly contrary to the Commission's concept of public interest, is without any support in fact or reasonable justification of assertion.

II

No broad question of administrative law or rule of statutory interpretation of general application is involved in this case.

The decision below turned in its entirety on a narrow question of statutory interpretation involving the power of the Federal Power Commission under Section 7 of the Natural Gas Act. The principles decided are applicable to no other administrative agency and, based upon past experience, will affect at most only a very small portion of the natural gas moving through facilities subject to Commission jurisdiction. In fact, as pointed out by the Court below, no case involving these particular issues had ever previously reached the courts.

This case does not present fundamental questions of Commission jurisdiction as for example in the *Phillips* case*, for the Solicitor General concedes that "the Commission has no direct authority under the Act over the sale of the gas in the field, or its end-use at the point of consumption", (S. G. Pet. pages 8, 9). Nor is this a case whose decision will affect vast numbers of certificate appli-

* *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672 (1954).

cations and correspondingly large sums of money as will the *CATCO* and *Atlantic Seaboard*** decisions. There is to the best of our knowledge no pipeline transportation certificate proceeding involving the direct purchase of gas from a producer by a utility or other industrial consumer now pending before the Commission.

Despite the unique character of this case and the limited application of the principles arrived at herein, the Solicitor General attempts to relate the issues in this case to those involved in other cases decided by this Court that are cited for the proposition that "the range of Commission inquiry can properly include areas within the industry which the Commission cannot directly regulate". (S. G. Pet. 12.) This case does not turn upon this general proposition of law. This general truism provides no assistance to the Court because it begs the question as to what particular facts the Commission can consider in certificate cases for what particular purposes. Certainly, it would not be contended that merely because the Commission can examine certain non-jurisdictional facts relevant to the feasibility of a proposed service it can therefore examine any fact for any purpose.

For example, the Commission customarily considers in pipeline certificate cases the extent of the reserves of natural gas that will support the proposed service. It did so in this case, without objection, although the reserves were not subject to the Commission's jurisdiction. However, if, after finding the reserves adequate to support the service the Commission had denied a certificate in order to keep such reserves locked in the ground because the

* *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378 (1959).

** *Public Service Commission of New York* v. *F. P. C.*, 361 U. S. 195 (1959).

gas was Texas gas instead of Louisiana gas, such action would have been unlawful, and an attempt by the Commission to control matters outside its jurisdiction*.

It is clear that the decision of the limited issues in this case does not rest upon the application of any broad principle of law as to the permissible scope of inquiry of administrative agencies in general, and that to frame the question, as the Solicitor General has done, in terms of what the Federal Power Commission may "consider" is confusing. What the Commission can "consider" is, in the final analysis, determined by what the Commission can *do*. The real issue, therefore, broadly stated is: Can the Commission do indirectly what Congress has said it cannot do directly? Or, more specifically, can the Federal Power Commission deliberately use its certificate power under Section 7 of the Act to regulate or prohibit a non-jurisdictional sale of natural gas or its non-jurisdictional use in a steam and electric generating station?

These questions can only be determined by careful examination of the intent of Congress as reflected in the legislative history of the Natural Gas Act. The conclusions will be applicable only to the particular facts and circumstances here involved and will not fix the proper ambit of the actions of administrative agencies in general.

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* Note the same distinction in *Colorado Interstate Gas Co.* v. *F. P. C.*, 324 U. S. 581 (1945) (cited S. G. Pet. at P. 12). In that case this Court held the Commission could properly consider non-jurisdictional pipeline production facilities for the purpose of assigning a value to the gas produced by the pipeline in fixing the pipeline's rates. If in that case the Commission had used the same information, however, for the purpose of undervaluing the natural gas produced by the pipeline, in order to discourage such production, such action by the Commission would have been contrary to the principle of this Court's decision in *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), in which it held that the Commission could not fix rates under Sections 4 and 5 of the Act for the purpose of disallowing, or discouraging, resales for industrial use.

III

The decision below does not conflict with the decisions of any other Court of Appeals.

The Court below carefully examined in its opinion all three decisions previously rendered by Courts of Appeals in which there had been mention of end-use as a factor in pipeline certificate cases*. The lower Court concluded that none of the cases was helpful as a guide in this case, that in none had there been a search of the legislative history of the Natural Gas Act to determine the authority of the Commission in this regard, and that the only concern in each was whether the Commission had failed to consider a matter of controlling significance. This, the lower Court said, "does not aid in deciding whether such matters may be considered at all".

The Solicitor General contends, however, that the "holding" of the Court in the *National Coal Association* case conflicts "at least in principle" with the views of the Court below (S. G. Pet., pages 24 and 25). This contention is wholly without merit and the purported conflict is illusory. The question at issue in the instant case, whether the Commission has the authority to use its certificate power to strike down non-jurisdictional activities, was never raised in the *National Coal Association* case. No party argued that the Commission lacked the power to deny a pipeline certificate on grounds of non-jurisdictional circumstances occurring before and after the jurisdictional transportation. To the contrary, the coal interests unsuc-

* *National Coal Ass'n.* v. *F. P. C.*, 191 F. 2d 462 (D. C. Cir. 1951); *Department of Conservation* v. *F. P. C.*, 148 F. 2d 746 (5th Cir. 1945), cert. den. 326 U. S. 717 (1945); *Charleston & Western Carolina Ry. Co.* v. *F. P. C.* 234 F. 2d 62 (D. C. Cir. 1956).

cessfully contended that the Commission had failed to adequately consider the effect of the issuance of the certificate upon competing fuels and the relationship of the project to the conservation of natural gas.

In the *National Coal Association* case, the Court stated:

> "Although considerations such as those suggested by petitioners may well be part of the complex out of which the Commission's judgment as to 'public convenience and necessity' arises, they are nowhere made standards governing the issuance or denial of certificates" (p. 467).

The Court held that evidence with respect to the effect on competing fuels and conservation matters cannot bar issuance of a certificate which satisfies the explicit standards furnished by Section 7(e) of the Act. This holding is completely consistent with the decision of the lower Court in this case and is contrary to the contention of the Commission and the Solicitor General that such matters *can* bar the issuance of a certificate that meets the conventional tests of Section 7(e).

IV

The Court below was correct in remanding the case to the Commission with directions to issue the certificate applied for.

In denying the certificate the Commission found that all of the conventional requirements of public convenience and necessity had been met except for a minor rate matter*.

* The Commission has agreed that it did not rely upon this purported deficiency as a ground for denying the certificate. See footnote 2 in the opinion of the Court below. The order of the Court below specifically left this matter open for decision by the Commission.

The gas supply, pipeline facilities, markets, and all significant rates were satisfactory.

Having made this finding after full consideration of the merits the Commission then determined that it would also consider as factors Edison's non-jurisdictional purchase and non-jurisdictional use of the gas for boiler fuel (R. 178a). It found against the proposal on these additional factors, which were considered as a separate group, and determined that these were sufficient "to tip the balance against the grant of the authority requested by Transco" (R. 178a).

The Court below held that the Commission had erred in weighing these additional non-jurisdictional considerations. Since the Natural Gas Act provides that, if the requisite conditions exist, "a certificate shall be issued," and the Commission already had found their existence, all that was left for the Commission was the performance of the ministerial act of issuing the certificate. It is this act that was ordered by the Court.

The cases cited by Petitioners are distinguishable from the above situation. In those cases a reviewing court had attempted to exercise the discretion allocated to the administrative agency. In the instant case the administrative function had been exercised and was not disturbed; the Court only ordered action mandatory under the statute.

Conclusion

This case embraces a number of unusual circumstances: the direct purchase of natural gas in the field by a local utility, the use of an interstate pipeline solely for transportation, and the need for natural gas as the only feasible remedy for a severe air pollution problem on congested Manhattan Island. Together they present a unique factual situation that it is unlikely will again recur.

The questions of law involve solely a determination of the powers of the Federal Power Commission under Section 7 of the Natural Gas Act in pipeline proceedings where a non-jurisdictional purchase of natural gas by a local utility for its own use is proposed. The situation is so rare that the narrow legal questions passed upon by the lower Court had not previously been presented for Court review. There is not now pending before the Commission any similar arrangement, nor is it likely that there will be others of the X-20 type except in those rare instances where the unique characteristics of natural gas outweigh (as in combatting air pollution) normal economic considerations.

In view of the singular factual circumstances and the absence of any significant legal question of broad application requiring decision by this Court, it is respectfully submitted that the soundly reasoned decision of the Court below should be left undisturbed and that the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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